EMPLOYMENT TRIBUNALS

Claimant: **Mr M Serra**

Respondent: **Royal Mail Group Ltd**

Heard at: **East London East (Cloud Video Platform)**

On: **13 - 15 April 2021**

Before: **Employment Judge Housego**
Members: **Mr L Bowman**
Mrs M Long

Representation

Claimant: Derek Adams, of Counsel
Respondent: John McArdle, Legal Executive, of Weightmans LLP

JUDGMENT

The Claims are dismissed.

REASONS

Background

1. Mr Serra was a postman for 20 years. He was dismissed for gross misconduct, specifically for verbally abusing his manager on two occasions. He claims it was unfair and race discrimination, based (in summary) on him being a foreigner (CMO 03 August 2020). In the hearing Mr Serra described himself as a white British European. He compares himself to white English people. Royal Mail say that it was a fair misconduct dismissal, and that the result would have been the same even if there was any procedural failing. In any event the matters Mr Serra accepts amount, they say, to 100% contribution. They do not understand the basis for the race discrimination claim.

Claims made and relevant law

2. Mr Serra claims unfair dismissal and race discrimination (direct, by reason of the dismissal, and in respect of 3 other claimed matters, and harassment).

3. Section 13 of the Equality Act 2010:

> "13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) ...
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) …

4. Section 26 of the Equality Act 2010:

> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

5. In respect of a claim for unfair dismissal, the Respondent has to show that the dismissal was for a potentially fair reason[1]. The Respondent says this was conduct which is one of the categories that can be fair[2]. It has to be shown that the dismissal was fair[3]. The employer must follow a fair procedure throughout[4], and dismissal must fall within the range of responses of a reasonable employer[5]. The range of responses is not infinitely wide[6]. It is unfair to dismiss automatically for gross misconduct[7]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

6. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the

[1] S98(2) of the Employment Rights Act 1996
[2] Also S98(2) of the Employment Rights Act 1996
[3] S98(4) of the Employment Rights Act 1996
[4] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[5] Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907
[6] The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames Water Utilities [2015] EWCA Civ 677, paragraph 61
[7] Department for Work and Pensions v Mughal (Unfair Dismissal: Reasonableness of dismissal) [2016] UKEAT 0343_15_1406

Tribunal's assessment of whether it was fair to dismiss[8]. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[9].

7. As it is asserted that the dismissal was by reason of unlawful discrimination the Tribunal must be satisfied that in no sense whatsoever was the dismissal tainted by such discrimination. For the discrimination claim, it is for Mr Serra to show reason why there might be discrimination[10], and if he does so then it is for the Respondent to show that it was not.

Issues

8. These were agreed between the parties some time ago (the list is undated):

Unfair Dismissal

1. Did the Respondent have a potentially fair reason for dismissing the Claimant?

The Respondent avers the reason for the Claimant's dismissal was conduct in line with s.98(2)(b) Employment Rights Act 1996

2. If so, did the Respondent have a genuine and reasonable belief of the Claimant's misconduct?

3. If so, were the reasonable grounds upon which to justify that belief?

4. If so, did the Respondent carry out such investigation as was reasonable in all the circumstances of the case?

5. If so, did the decision to dismiss the Claimant fall within the range of reasonable responses open to a reasonable employer in the circumstances?

6. If not, did the Claimant contribute to his dismissal through his conduct?

7. If the dismissal is found to be procedurally unfair, would the Claimant have been fairly dismissed in any event had a fair procedure been followed?

Race Discrimination

a. Direct Discrimination

1. Did the Respondent subject the Claimant to the following treatment?

1.1 Subjecting the Claimant to an unwarranted disciplinary investigation, up to and
including his dismissal?

[8] Section 98(4) of the Employment Rights Act 1996
[9] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[10] Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

1.2 In/around October 2018, Chris Walpole shaking the Claimant's hand for 'several seconds' and whilst 'grinning' in an attempt to 'intimidate' the Claimant or 'incite trouble';

1.3 In/around December 2018, Chris Walpole stating to the Claimant that he would have 'more chance of getting to work in a tomato boat, well they are the same colour' to the Claimant;

1.4 In/around December 2018, Chris Walpole failing to allow the Claimant to use the work van due to his car having broken down;

2. If any of the above acts did occur, was this because of the Claimant's race?

The Claimant relies on the following comparators:

2.1 Graham Lee, John Stephens, Lisa Boyton and Richard Llewellyn (in respect of allegation 1.1 above);

2.2 the Claimant's 'White, English colleagues' (in respect of allegation 1.2 and 1.3 above);

and

2.3 Leslie Harper and Darren Mansfield (in respect of allegation 1.4 above).

b. Harassment

In the alternative, the Claimant avers that the treatment at 1.1-1.4 above amounts to unlawful harassment related to his race. Did the Respondent subject the Claimant to the treatment outlined at paragraphs 1.1-1.4 above?

If any of the above acts did occur, was this conduct unwanted and did it have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

If yes, was this conduct related to the Claimant's race?

9. Case law indicates that a list of issues is not a pleading, but a tool to facilitate a hearing, and could not be approached with the formality one might approach a commercial contract or pleading[11]. Nor must a Tribunal stick slavishly to them[12]. In this case the list of issues clearly set out the Claimant's case.

Evidence

[11] Leslie Millin v Capsticks Solicitors LLP and Others: UKEAT/0093/14/RN
[12] Saha v Capita UKEAT/0080/18/DM

10. Mr Serra gave oral evidence. For the Respondent, oral evidence was given by Christopher Walpole (Mr Serra's manager), Daniel Lawrence (who dismissed Mr Serra) and by Andrew Brown (who took the appeal). There was a document bundle of 288 pages.

The Claimant's case

11. He had worked for Royal Mail for over 20 years. He was born in the UK and is a British citizen. In 2014 he changed his name by deed poll from Michael Ward to Michael Angelo Serra. One of his parents is Maltese, the other is half Italian. He is a white British European. In 2016 he changed the name by which he was known at work to Serra. That was when attitudes to him changed. He had a foreign name and he has curly hair.

12. He had worked with Mr Walpole when he first started with Royal Mail 20 years ago, for about 2 years. In interview while still employed he had said that he had no issues with Mr Walpole then. In oral evidence he said that there had been issues at the time. Mr Walpole became his manager in the recent past. In October 2018 there had been the handshaking issue. Mr Walpole had not treated him fairly over the use of a Royal Mail van. When he is discussing this, Mr Walpole had made the tomato boat comment which he found insulting.

13. On 09th January 2019 he had not felt well. He was on a stage 2 attendance warning at the time. This was not fair, and it should have been only stage 1. Because he did not want to risk a further escalation of the attendance process he came to work. He told Mr Walpole that he was not feeling well, but Mr Walpole was unsympathetic, and told him he looked ok. There was then a row, but Mr Walpole overstated it. Then Mr Walpole telephoned him on 12th January 2021. He had wanted Mr Walpole to come to his house so that he could see for himself how ill he (Mr Serra) was. He had recorded the conversation.

14. When he was brought to interview he played that recording. He was charged with 4 things, two of which were the 9th and 12th, one was delaying the mail, and the last was the covert recording, so he deleted it. It showed him in a good light and bore out what he said. He had never threatened or been aggressive towards Mr Walpole.

15. The process was flawed, because they should not have relied on the accounts of the recording given by Scott McInnes (who had interviewed him) and Leanne Andrews (note taker). They should have interviewed others present on 9th. The union rep he had had later become a manager, and was not really on his side at all. Mr Walpole had not been truthful. He had signed a community resolution order after Mr Walpole complained to the police, because they forced him to, and he had not admitted anything to them.

16. The accounts of Scott McInnes, Leanne Andrews and of Mr Walpole did not contradict his account that he wanted Mr Walpole to come to his house to see how ill he was, not as a threat to fight him. While he accepted that he had used foul language he said this was about others, and not directed at Mr Walpole personally.

17. Mr Lawrence's evidence was that he had sworn throughout the disciplinary hearing, but there was no contemporaneous note of that.

18. It was all linked to his race, set out as having a foreign sounding name, curly hair, and a Maltese/Italian heritage.

The Respondent's case

19. The handshake and tomato boat allegations simply did not occur.

20. On 9th it was Mr Serra who had been angry and shouting. Mr Serra accepted that he had said *"you don't want to see me angry"*. Mr Llewellyn and Ms Burrows had heard part of the row, and had said that Mr Serra was angry and abusive. Mr Serra had never asked them to interview anyone else, and it was doubtful anyone else heard. Mr Walpole had arranged for Mr Llewellyn to do 25% of Mr Serra's walk that day, and made sure that he told Mr Serra to call him if there was any further problem, and he did not.

21. Mr Walpole was shaken by the call on 12th, which Mr Serra had asked him to make to tell him what action Mr Walpole had decided to take about 9th. Mr McInnes and Ms Andrews had heard the recording and backed up what Mr Walpole said about it. Mr Serra would surely have complained if their account had backed him up and they had been ignored. In the absence of the recording (which they said the union rep had advised him to delete as it was so damaging) they had to use the best evidence they had which was that of Mr McInnes and Ms Andrews who had heard it. The community resolution order was relevant to their estimation of credibility.

22. This was clearly gross misconduct within the policies of the Royal Mail. Mr Lawrence's account that Mr Serra had sworn throughout the disciplinary hearing was relevant to insight. There was a previous similar matter, warning expired, but little reason to have confidence that it would not recur as Mr Serra expressed no regret or remorse and felt that he had nothing to apologise for.

23. Mr Lawrence and Mr Brown had no previous connection with Mr Serra. Mr Lawrence had not upheld the two matters of delaying the mail and about the covert recording. They were independent decision makers.

24. No one was allowed to take vans home save in case of emergency. Mr Walpole had found that the policy was not enforced in his area, and had tightened it up, so that no one took vans as a matter of routine.

25. None of the witnesses had any idea about Mr Serra's heritage. It most certainly was nothing to do with his appearance, because he said he had no issues between 2000 and 2016 when he was known as Michael Ward.

Submissions

26. Mr McArdle said that this was a standard gross misconduct dismissal, with genuine belief in misconduct on reasonable grounds after proper investigation. He said there was a fair procedure. It was gross misconduct and dismissal was within the range of response of the employer. If there

were any procedural errors in the dismissal the appeal cured them, or they made no difference. Even if not there was a 100% contribution from Mr Serra.

27. The first two allegations about race did not occur. The asserted tomato boat comment made no sense, and anyway Mr Walpole had no way of knowing where Mr Serra's ancestors came from. In cross examination Mr Serra had said that he viewed the shaking hand matter as bullying unconnected with race. The van policy was applied to everyone, and as none of the witnesses had any idea about Mr Serra's ancestry the race claim, which appeared to be no more than that he had a non English name, was unsustainable.

28. As to the asserted disparity in treatment, none of these stood up, for various reasons: either the matters put forward were wrong, or there were good reasons for the decisions made.

29. Mr Adams cast doubt on the credibility of the evidence of the witnesses for the Respondent. Mr Lawrence had told Mr Brown that Mr Serra had told him that he would act the same if it happened again, and that it was recorded in his notes, but it was not in those notes. Mr Lawrence said that Mr Serra had sworn throughout their meeting, but again this was not recorded in his notes. Mr Lawrence did not have a genuine belief in the misconduct.

30. Mr Llewellyn and Ms Burrows did not give clear evidence of what happened on 9th. Mr Serra had denied to Mr Walpole that he was angry, and that was the context of the *"you don't want to see me when I'm angry"* comment. Mr Walpole had not, in cross examination, been able to give any concrete example of what Mr Serra was supposed to have said.

31. Three other people had not been interviewed about 9th and should have been.

32. As to 12th, Mr Serra's evidence was that the signing of the police form was no admission of guilt. It was extraordinary that Mr Walpole should report a telephone conversation to the police.

33. Mr Serra had faced a misconduct charge over the recording. The accounts of the recording from Mr McInnes and Ms Andrews should not have been relied upon. Mr Serra had deleted the recording as he was charged with making it, so it was unfair to him to rely on it, now that it was unavailable to him.

34. The recording was in his favour, and he had deleted it because his union rep told him to do so. Why would he produce something that damaged his case? It was not as portrayed by Mr McInnes and Ms Andrews. This matter went to the heart of the unfairness.

35. The notes of the discussions with these two were not shown to Mr Serra by Mr Lawrence.

36. Mr Brown had no evidence to say that he was not convinced that there would be no repetition. There was no attempt to look at counselling and

coaching, for an employee of 20 years standing, by either Mr Lawrence or Mr Brown.

37. Context had not been considered: Mr Serra had come to work ill on 9th. Mr Walpole should not have phoned Mr Serra at all on 12th, even if Mr Serra had asked him to do so. Mr Walpole should have got someone else to call him. If Mr Walpole had not called Mr Serra on 12th there would have been no such allegation, and it was provocative of Mr Walpole to do so.

38. As to 9th, Mr Llewellyn heard only that Mr Serra said that he *"was not fucking swearing*" not swearing at Mr Walpole. In the account of Ms Andrews and Mr McInnes they say that Mr Serra was telling Mr Walpole to come to his house to see how ill he was (but accepted that their accounts of hearing the recording of the call of 12th went on to say that Mr Serra was threating abusive and intimidating).

39. Even if there was misconduct, after 20 years there should have been a sanction less than dismissal, such as suspension and transfer. There was no contribution to his dismissal by Mr Serra. It was Mr Walpole who had been the instigator of the row on 9th by his insensitive comment that Mr Serra did not look ill, when he was, and it was Mr Walpole who made the call on 12th when he should not have done.

40. As to the race claim, there was no reason for Mr Serra to make these up. Mr Serra had set out a series of things where white English people had been treated better than he was.

41. Mr Serra wished to add something. He started to embark on submissions about matters not in the list of issues, not referred to in evidence and which appeared to be separate and unrelated allegations about the way the Respondent had treated him over the years. I indicated that this was not appropriate, and he did not continue.

Facts found

42. The background is set out above. The factual matters set out by both advocates in their submissions (recorded above) are correct.

43. Mr Serra had an altercation with his manager Mr Walpole on 9th January 2019. He said he was ill, but had come to work because of his stage 2 attendance record. There is nothing to support Mr Serra's assertion that it should have been a stage 1 warning.

44. Mr Llewellyn and Ms Burrows heard some of it. This is a heavily unionised workplace, and Mr Walpole's observation that they are unlikely to have been detailed in their accounts is correct. However, and taking into account Mr Adams critique of what they said, it is clear that Mr Serra was agitated, threatening and abusive. Mr Llewellyn recalled Mr Serra saying *"I'm not fucking swearing"* which can only have been in response to Mr Walpole objecting to his language, and of course the phrase used by Mr Serra speaks for itself.

45. Mr Serra does not dispute that Mr Walpole arranged for Mr Llewellyn to do 25% of his round that day, and asked Mr Serra to phone him if he had any other issue that day.

46. Mr Walpole should not have telephoned Mr Serra on 12th. Mr Brown accepted as much in his oral evidence. However, Mr Serra clearly shook Mr Walpole by what he said in that call, to the extent that Mr Walpole called the police about it. Mr Brown asked Mr McInnes about this (for Mr McInnes had heard the recording) and put to him that Mr Serra was saying that he was not confrontational. Mr McInnes was emphatic in his refutation of that position – *"No, nowhere close".* Mr Serra accepted that there was bad language used by him in that call, apologising to Ms Andrews for the language she was about to hear (Mr Serra's own evidence). Both say that it was Mr Serra who was threatening intimidating and abusive, and that Mr Walpole was calm throughout.

47. Mr Serra poses the rhetorical question as to why he would produce a recording that was damning. Put simply, he shot himself in the foot. He had no understanding of how abusive he was being – supported by the absurd *"I'm not fucking swearing"* comment on 9th.

48. In the absence of the recording (for the reason given by Mr McArdle) the Respondent was correct in using the best evidence available to it.

49. Mr McInnes is not to be criticised for not making a full note of the recording, because he asked Mr Serra for a copy of it, which Mr Serra agreed to provide, before deleting it. Whether it was deleted because the union rep saw how damaging it was, or because he was charged with making it, is not germane.

50. Whether Mr Serra was asking Mr Walpole to come to his house to see how ill he was, or as an invitation to a fight, and whether Mr Serra was calling other people *"fucking cunts"* or Mr Walpole is also not to the point: both people who heard the recording were clear that Mr Serra was abusive, threatening and intimidating, and that Mr Walpole was calm. The language was unacceptable whoever Mr Serra was speaking about, and this was a conversation with his manager.

51. Mr Serra accepted that he did not know either Mr McInnes or Ms Andrews and had no reason to cast doubt on the truthfulness of their accounts. There is some initial uncertainty about the use of the word *"cunt"* in their witness statements, but as Mr Serra agrees he used that word repeatedly nothing turns on that. It is clear that Mr Walpole was subjected to a lengthy abusive and threatening tirade on 12th.

52. Mr Lawrence was clearly taken aback by Mr Serra's approach in the disciplinary hearing. The Tribunal accepted his evidence about this. (Mr Brown said that Mr Serra did not behave in this way during his hearing.)

53. None of the 3 witnesses knew anything about Mr Serra's heritage until reading the papers for this hearing.

54. The handshake incident did not occur. Mr Walpole does not go in for handshaking in general and not with work colleagues in particular. In any event in his oral evidence even Mr Serra did not attribute this to race, but to bullying, so it cannot found a race discrimination claim.

55. The tomato boat comment was not made. It is incomprehensible as an allegation. It appears that Mr Serra says that Italy is famed for tomatoes, and so it is a disparaging reference to his heritage.

56. Mr Walpole is the area equality rep for Unison. The Tribunal accepted his evidence that he had no idea where Mr Serra's ancestors came from. He would seem an unlikely person to make such a comment, which is relevant to the assessment of whether, on the balance of probabilities, it occurred.

57. On 09th Mr Serra was 10 days short of the expiry of a warning to do with quality of work. This was of a different order and not part of the reason to dismiss. He had in the past had a warning about conduct, but it was expired and not taken into account as a reason to dismiss. It had marginal relevance as it was the absence of a clean record (but over a long period).

58. Mr Serra signed a community resolution order when the police called on him. He says he felt forced to do so, and that the police got him to sign when it was dark and he did so on the roof of his car without reading it. Whatever he knew or did not know about the exact meaning of such a document, it cannot be other than that he knew he was in the wrong about the call of 12th with Mr Walpole.

Conclusions

59. The dismissal was for misconduct. There was no ulterior motive. It was a fair dismissal. This was gross misconduct. While Mr Walpole should not have phoned Mr Serra on 12th Mr Serra was solely responsible for the diatribe he launched at Mr Walpole, and Mr Serra had expressly asked Mr Walpole to call him. (The Tribunal records that Mr Walpole said, and there is no reason to doubt, that he had called the human resources department in Sheffield to ask them if he should call Mr Serra and had been told that it was in order).

60. Mr Serra then dug himself in deeper by the way he approached his disciplinary hearing. All the people involved in the process were entirely appropriate.

61. It is not surprising that Mr Walpole, Mr McInnes or Ms Andrews (or Mr Lawrence in connection with the disciplinary hearing) do not recall precise snippets from what Mr Serra said. The 9th was a sustained abusive threating tirade full of foul language. Mr Lawrence had never heard anything like it, and did not want to write down such language in his notes.

62. The Tribunal found the procedure to be fair. Mr McInnes and Ms Andrews were unknown to Mr Serra. Mr Lawrence and Mr Brown were not connected with Mr Serra in any way, and were proper people to take the hearing. Some of Mr Adam's criticisms of Mr Lawrence's process are correct (they are set out above) but Mr Brown corrected them. In so far as those criticisms go to

the weight to be accorded to the evidence of Mr Lawrence to us, and to Mr Brown, we do not accept them. Mr Serra has never acknowledged that he did anything wrong. He did not do so in this hearing. He is most unlikely to have done so to Mr Lawrence (or to Mr Brown).

63. Mr Brown conducted the appeal as a rehearing, and did so fairly. Mr Serra knew what information Mr Brown had, on which to base his decision. Mr Serra had full opportunity to put his case.

64. At no point did Mr Serra or his union rep ask for others to be interviewed about 9th. Mr Serra says that it is not for him to do so, but even if so, the employer had witness statements from Mr Llewellyn and Ms Burrows, which were enough. They had no reason to think that any other witness might say anything else, and there is no reason to think they knew there might be any other witnesses.

65. For the 9th there was the evidence of Mr Walpole, Mr Llewellyn and Ms Burrows. For 12th there was Mr Walpole, Mr McInnes and Ms Andrews. There was every reason for the decision makers to find, on the balance of probability that Mr Walpole's account was correct in both instances.

66. Mr Serra was unrepentant before Mr Lawrence (and swore throughout that hearing) and before Mr Brown. He did not have an unblemished record (although a conduct finding was expired). He was towards the end of a 2 year sanction about performance. Even with 20 years' service, this was conduct which it would be perverse to find did not fall within the range of responses of the reasonable employer. The Tribunal accepted that Mr Lawrence and Mr Brown considered whether any other sanction was appropriate, but decided not, given the absence of insight remorse and remediation. He did not accept that what he had done was wrong and did not apologise for it.

67. Even if the flaws identified meant that there was not a fair procedure, there would have been a dismissal with a fair procedure. It follows that there would have been a *Polkey*[13] reduction, which the Tribunal would place at 100%.

68. Further, given this history there would be a reduction in 100% compensation by reason of contributory conduct[14]. Mr Serra brought this on himself.

69. The race discrimination claim is incomprehensible. Mr Serra said he was *"a foreigner"* in the Case Management hearing of August 2020. Before us he said he was *"white British European"*. Plainly nothing is to do with his physical appearance (he referred only to *"curly hair"* but said also that people said he looked very English with his blue eyes) because his evidence is that everything was fine until he changed his name at work from Ward to Serra. When asked how anyone might know that name was Italian or Maltese, Mr Serra said that it was Spanish, or Portuguese or Italian. How anyone would connect his name with a country producing tomatoes, or why anyone would compare a post office van to a boat, or why tomatoes come

[13] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[14] S122(2) and S123(6) of the Employment Rights Act 1996

in ships is not coherent. Perhaps it is an analogy to the insult to those of Caribbean heritage about banana boats, but Mr Serra did not say so.

70. The handshake incident did not occur (and is now not said to be race discrimination).

71. The use by Mr Serra of a Royal Mail van to get to and from work was stopped as with everyone else. There was no less favourable treatment.

72. The comparators picked by Mr Serra were not true comparators. One person was said not to have been disciplined for working while off sick. She lived upstairs in the pub she and her husband owned and took ill health early retirement. There was no record of another person leaving an iPhone on a doorstep and it being stolen and compensation of £600 being paid. There was no record about the person said to have signed a special delivery item for a customer. There is nothing in any of these.

73. The burden of proof does not shift to the Respondent. Had it done so, the Respondent would have discharged it.

74. For these reasons the Tribunal finds that Mr Serra was fairly dismissed by Royal Mail Group Ltd, and that he did not suffer race discrimination as he asserted.

Employment Judge Housego
Date 15 April 2021